SUBRAMANIAM ARUMUGAM

v.

PP

FEDERAL COURT, KUALA LUMPUR
EUSOFF CHIN CJ
LAMIN MOHD YUNUS PCA
WAN ADNAN CJ (MALAYA)
MOHAMED DZAIDDIN FCJ
ZAKARIA YATIM FCJ
[CRIMINAL APPEAL NO: 05-44-91]
28 FEBRUARY 2000

CRIMINAL PROCEDURE: *Prosecution - Close of prosecution - Standard of proof required - Test to be applied - Whether prima facie case - Whether proof beyond reasonable doubt - Whether standard of proof required to establish prima facie case is proof beyond reasonable doubt*

EVIDENCE: *Expert evidence - Evidence of chemist - Dangerous Drugs Act 1952, ss. 2, 39B(1a) - Trafficking in cannabis - Chemist omitting words "section 2" from report - Whether omission fatal to charge of trafficking - Whether depends on evidence of chemist in each particular case - Whether sufficient to state "Cannabis is as defined in the Dangerous Drugs Act 1952" - Whether essential ingredients of statutory definition of 'cannabis' satisfied - Whether chemist could have meant Indian Hemp*

EVIDENCE: *Presumption - Dangerous drugs - Dangerous Drugs Act 1952, s. 37(d) & 37(da) - Whether presumption of trafficking becomes irrebuttable if defence fails to rebut presumption of possession - Whether court must consider separately whether presumption of trafficking rebutted - Whether failure to consider renders conviction for trafficking bad*

CRIMINAL LAW: *Dangerous Drugs Act 1952 - Section 39B(1a) - Trafficking in cannabis - Chemist report - Whether omission to state "section 2" in chemist report fatal to charge of trafficking - Whether chemist could have meant 'Indian Hemp' instead of 'cannabis' - Presumption of trafficking - Whether rebutted - Whether failure of trial judge to consider rendered conviction for trafficking bad*

This was the appellant's appeal against his conviction under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking in 236.07g of cannabis. The three grounds canvassed herein before the Federal Court were: (i) that the trial judge had erred in concluding that the prosecution

had established a '*prima facie* case' against the appellant as the correct standard of proof applicable at the close of the case for the prosecution at that material time was the 'beyond reasonable doubt' standard (*Khoo Hi Chiang v. PP & Another Case*); (ii) that the statement in the chemist's report, *ie*, "Cannabis is as defined in the Dangerous Drugs Act 1952", did not include the words 'section 2', thereby giving rise to the inference of a probability that the substance which the chemist had analysed was Indian Hemp (Part III, 1st Schedule) (*Shukri Mohamad v. PP*); and (iii) that the trial judge had failed to consider whether the appellant had rebutted the statutory presumption of trafficking under s. 37(da) of the Act (*Mohamad Radhi Yaacob v. PP*).

Held:

Per Mohamed Dzaiddin FCJ

[1] The trial judge had applied the '*prima facie* test' in evaluating the prosecution's evidence when the standard of proof at the close of the case for the prosecution at that material time was the 'beyond reasonable doubt' standard. (*Khoo Hi Chiang v. PP & Another Case*; *Arulpragasan Sandaraju v. PP)*.

[2] Whether the omission to mention 'section 2 of the Act' is fatal must depend upon the evidence of the chemist in each particular case. If a chemist testifies or certifies to the effect that the plant material he analysed contains the ingredients of cannabis as **defined** in the Act, then it does **not** matter whether he mentions the words 'section 2'. If the testimony of a chemist satisfies the essential ingredients of the statutory definition of 'cannabis' under the Act, then the mere omission to mention the words 'section 2' is immaterial and should not affect his expert opinion. In the instant case, since the chemist had, based on the results of his analysis, stated in his report that "Cannabis is as defined in the Dangerous Drugs Act 1952", he must have had in mind only 'cannabis' as defined in s. 2 of the Act as Indian Hemp was not defined anywhere in the Act. (*Mohd Yusof Said v. PP*; *Abdullah Yaacob v. PP*).

[3] The presumption of trafficking under s. 37(da) of the Act does **not** become irrebuttable merely because the defence has failed to rebut the presumption of possession under s. 37(d) of the Act. Unless the evidence in a particular case does not obviously so warrant, it is incumbent for the court to consider, as a separate exercise, whether on a balance of probabilities the evidence of the defence has rebutted the statutory presumption of trafficking even though the court is satisfied that the presumption of possession has not been rebutted. In the instant case, the trial judge had

failed to consider, as a separate exercise, whether the appellant had succeeded, on a balance of probabilities, in rebutting the statutory presumption of trafficking under s. 37(da) of the Act.

[Appeal allowed on third ground; conviction for trafficking substituted with one for possession.]

Case(s) referred to:
Abdul Karim Pak Kub & Anor v. PP [1997] 2 CLJ 383 ***(refd)***
Abdullah Yaacob v. PP [1991] 2 MLJ 237 ***(foll)***
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 ***(refd)***
Khoo Hi Chiang v. PP [1994] 2 CLJ 151 ***(refd)***
Lt Kol Yusof Abdul Rahman v. Kol Anuar Md Amin [1997] 2 CLJ 752 ***(refd)***
Mohamad Radhi Yaacob v. PP [1991] 3 CLJ 2073 ***(foll)***
Mohd Yusof Said v. PP [1996] 2 CLJ 13 ***(foll)***
PP v. Alcontara [1993] 4 CLJ 112 ***(dist)***
PP v. Ong Cheng Heong [1998] 4 CLJ 209 ***(refd)***
Shukri Mohamad v. PP [1995] 3 CLJ 799 ***(dist)***

Legislation referred to:
Courts of Judicature Act 1964, s. 92(1)
Criminal Procedure Code, ss. 173(f), 180, 399
Dangerous Drugs Act 1952, ss. 2, 6, 12(2), 37(d), (da), 39A(2), 39B(1)(a), (2)

For the appellant - Karpal Singh (Jagdeep Singh Deo with him); M/s Karpal Singh & Co
For the respondent - Dato' Mohd Zaki Md Yasin

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 47-3-91]

Reported by Gan Peng Chiang

JUDGMENT

Mohamed Dzaiddin FCJ:

This was an appeal from the judgment of the High Court Kuala Lumpur on 6 April 1991 which convicted the appellant for trafficking in 236.07 grams of cannabis under s. 39B(1)(a) of the Dangerous Drugs Act 1952 (the Act) on 8 September 1988 at a roadblock at Jalan Robson, off Jalan Syed Putra, Kuala Lumpur. The appellant was sentenced to death under sub-s. (2) of s. 39B of the Act.

We heard the appeal on 13 July 1999 specially to consider whether the omission to state **s. 2 of the Act** in the chemist's evidence or in his report has excluded the probability that the substance he has analysed was "cannabis (Indian Hemp)", a drug listed in Part III of the First Schedule of the Act as a result of *Shukri bin Mohamad v. Public Prosecutor* [1995] 3 CLJ 799; [1995] 3 MLJ 229.

Background

The prosecution evidence was as follows. On 8 September 1988 at about 2.15pm during the course of a routine roadblock at Jalan Robson, off Jalan Syed Putra, Kuala Lumpur, PC Kamarnor bin Abdullah (PW2) stopped the appellant and his pillion, one Periannan a/l Pichay who were on motorcycle BCN 5947. There were five other policemen at the scene. The appellant was asked for his driving licence which he could not produce. The appellant however produced his identity card (exh. P4) from his wallet which he took out from his trouser pocket. The appellant's name according to the identity card was ascertained to be Balakrishna a/l Thanimalal. While checking the road tax of the motorcycle, PW2 noticed a red plastic bag (exh. P7) in the carrier-basket. He told the appellant to take the bag out and to open it. On the appellant opening the plastic bag, PW2 noticed a newspaper package (exh. P8) inside P7. The appellant opened this package which had another newspaper package (exh. P9). This latter package contained a number of rolls of yellow paper tied up in bundles (exhs. P10A to Q) which were suspected to be cannabis. These exhibits were shown to PC Ahmad bin Mohd. Saman and Corporal Hapidz bin Ahmad (PW3) in the presence of the appellant.

The appellant was told to re-wrap the package and to place it back in the plastic bag. PW2 then arrested the appellant and Periannan on the instructions of PW3 who took possession of the plastic bag. The appellant and Periannan were taken to the Brickfields police station, where PW2 counted the bundles of rolls of suspected cannabis in the presence of the appellant and Periannan. There were sixteen bundles of fifty rolls each and one bundle of thirty rolls, making a total of eight hundred and thirty rolls of suspected cannabis. PW2 then lodged a police report.

At about 5.10pm on the same day, PW2 handed over the appellant, Periannan, and all the exhibits which he had seized, to Inspector Hassan Jalaludin bin Abdul Malik (PW7) of the Cawangan Anti Dadah, Contingent Police Headquarters, Kuala Lumpur, who later became the investigating officer of the case.

PW7 testified that he received the exhibits pertaining to the case from PW2 and kept them in safe custody. On 8 September 1988 he took the suspected cannabis to the Chemistry Department Petaling Jaya and handed it to the Government Chemist, Encik Cheong Meow Koon for analysis. He received the package back on 12 January 1989 with a copy of the chemist's report (exh. P19). On 5 February 1991, he served a copy of the report on the appellant.

The chemist, Encik Cheong Meow Koon, did not testify in court. However, his report (exh. P19) under s. 399 CPC was tendered at the trial. It reads as follows:

> I found in package "A" a plastic bag in which was a newspaper package containing 830 paper rolls in 17 bundles each tied with a rubber band. The 830 paper rolls contained a total of 236.07 grams (nett) of dried plant material which on analysis, I found to be "cannabis".
>
> **"Cannabis" is as defined in the Dangerous Drugs Act, 1952.** During analysis, all the above plant material had been removed from the paper rolls and the balance after analysis was sealed in a plastic packet marked with the above Laboratory Number. (emphasis added).

At the close of the prosecution case, the learned judge held as follows (p. 100 Rekod Rayuan):

> I found that the prosecution had established a *prima facie* case against the accused and called on him to enter upon his defence. The presumption under section 37(d) of the Act was applicable in his case as the accused was, according to credible evidence up to the close of the case for the prosecution, found to have had in his custody and under his control the plastic bag which contained the cannabis, which was the subject matter of the charge. He was therefore deemed to have been in possession of the cannabis and deemed to have known its nature. The onus shifted to the accused to proved the contrary on the balance of probabilities.

The Defence

The appellant elected to make a statement from the dock. He stated that on 8 September 1998 at about 8am he went to General Hospital Kuala Lumpur with a friend named Maruthamuthu on the latter's motorcycle to visit a relative. After being told that the relative was not in the hospital, he borrowed Muthu's motorcycle to go to Brickfields. On the way he met Periannan at a bus stop and invited him to go to a toddy shop for a drink. At about 1.30pm they proceeded towards Jalan Robson. They stopped at a police roadblock. He noticed there were about ten motorcycles ahead of him waiting to be checked by the police. He stopped the motorcycle near a drain. At first PW2 did not ask him anything. But, he took a plastic bag which was by the side of the drain and asked him "Beg ini siapa punya? (Whose bag is this?)" after that PW2 asked him for his identity card and driving licence. He informed PW2 that he did not have a driving licence and had lost his identity card. He also informed PW2 that the bag was not his. PW2 then opened the bag and examined it after which he asked him further, "Ganja ini siapa punya? (Whose cannabis is this?)". The appellant replied he did not know. Both he and Periannan were arrested and brought to the Brickfields police station. The appellant denied that he ever handled the plastic bag which was shown to him by PW2.

In essence, the appellant's defence was a complete denial of any knowledge about the cannabis in the red plastic bag (P7).

At the close of the defence, the learned judge made the following finding (p. 115 Rekod Rayuan):

> I concluded from the evidence that the accused was caught redhanded with the cannabis and he only made a feeble attempt to show otherwise through his statement from the dock. The story he told was not credible in the circumstances and I found that he had failed to discharge the onus which lay upon him to rebut the case for the prosecution on a balance of probabilities. He was therefore found guilty and convicted as charged.

The Appeal

Before us, the appeal was argued on three grounds. First, Encik Karpal submitted that the trial judge had applied the wrong test when he concluded that the prosecution at the close of its case had established a *prima facie* case against the appellant, when the standard of proof at the material time was beyond reasonable doubt (*Khoo Hi Chiang v. Public Prosecutor* [1994] 2 CLJ 151; [1994] 1 MLJ 265). Counsel referred us to a number of relevant authorities on the meaning of *"prima facie"* which established that *"prima facie"* cannot mean "beyond reasonable doubt". In the circumstances, he contended that this was a material misdirection by the trial judge which could not be cured by the court invoking the proviso to s. 92(1) of the Courts of Judicature Act 1964.

Secondly, counsel submitted that the omission to state the words "s. 2" of the Act in the chemist report (P19) had given rise to an inference of a probability that the substance which the chemist had analysed was cannabis (Indian Hemp) in view of *Shukri*. Counsel pointed out that the statement in P19 was worse than what the chemist in *Shukri* has testified. First, the chemist did not give evidence. Secondly, P19 made no mention of the tests conducted and the result of the physical examination, if any. In the circumstances, following *Shukri* the appellant was entitled to a benefit of the doubt as the inference would be that he had committed an offence in a lower degree of seriousness ie, for possession of Indian Hemp, where a finding on a higher degree ie, cannabis, would merit a death sentence. We shall discuss the effect of *Shukri* shortly.

The third ground was the failure of the trial judge to follow *Mohamad Radhi bin Yaacob v. Public Prosecutor* [1991] 3 CLJ 2073; [1991] 3 MLJ 169 when he convicted the appellant for trafficking without addressing his mind on the question whether the defence had rebutted the statutory presumption of trafficking under s. 37(da). Encik Karpal referred us to the

grounds of judgment of the trial judge which he contended dealt only on the statutory presumption under s. 37(d) without adverting to the presumption under s. 37(da). On this point, Dato' Mohd Zaki, TPR agreed that the trial judge based the conviction for trafficking on the failure of the appellant to rebut the presumption of possession under s. 37(d) without considering s. 37(da).

After considering the evidence and the conclusion of the learned trial judge, we found that his Lordship had misdirected himself in failing to adopt *Mohamad Radhi* in considering whether on the balance of probabilities the evidence of the defence had rebutted the statutory presumption under s. 37(da) of the Act, although he found that the appellant had custody and control of the red plastic bag and therefore deemed to be in possession of the drug. Accordingly, we allowed the appeal on this ground, quashed the conviction, set aside the death sentence and substituted a conviction under s. 6 and sentenced the appellant to 12 years imprisonment under s. 39A(2) to take effect from the date of arrest and whipping of ten strokes.

We indicated that we would give our reasons in due course which we do so now.

On the first ground, we note that the trial judge applied the *prima facie* test when calling upon the appellant to make his defence, although at the material time the standard of proof was not the "*prima facie*" test, but "beyond reasonable doubt" test, following *Khoo Hi Chiang* and *Arulpragasan v. PP* [1996] 4 CLJ 597; [1997] 1 MLJ 1 (majority decision). However, what was put forward to this court by counsel was not so much whether the learned judge had misdirected himself on the standard of proof, but whether the Court of Appeal decision in *Lt. Kol. Yusof bin Abdul Rahman v. Kol. Anuar bin Md. Amin* [1997] 2 CLJ 752; [1997] 1 MLJ 562, a case decided prior to the amendment of ss. 173(f) and 180 CPC *vide* Act A979, was correct in holding that the degree of proof required to establish a *prima facie* case is proof beyond all reasonable doubt. In view of a later decision of the Kangar High Court in *Public Prosecutor v. Ong Cheng Heong* [1998] 4 CLJ 209; [1998] 6 MLJ 678, which distinguished and disagreed with *Lt. Kol Yusof*, we were therefore urged to give a ruling on *Lt. Kol. Yusof.*

We think for the moment it is unnecessary for us to express our view on the point, nor do we want to enter into an intellectual discourse on the meaning of the words "*prima facie*". Also, in fairness to the learned Mr. Deputy, he would require more time to "get up" the authorities to respond to counsel's argument.

With respect to the second ground, which is the heart of the appeal, we are satisfied that the chemist report (P19) made no mention of the words "s. 2". In addition, it did not mention whether the analysis was based on the microscopic examination and the basic tests using chemical methods eg, the Dequenois Levine and the Thin Layer Chromatography tests. It also made no mention of the result of his physical examination of the plant material. We can safely conclude that P19 suffered from the same defects or infirmities which were recognised in *Shukri*.

In *Shukri*, the point taken at the appellate stage was that the trial judge was wrong in relying on the evidence of the chemist SP9, which evidence had created a doubt as to whether the substance he had analysed was "cannabis" within the meaning of **s. 2 of the Act** or "cannabis (Indian hemp)", a drug listed in Part III of the First Schedule of the Act. The Federal Court of three members analysed the evidence as follows:

> A scrutiny of the record provided shows that, in essence, all the chemist had said on the point at issue was that the result of his examination and analysis of the various quantities of plant material which constituted the subject matter of the charge aforesaid, showed that in each case it was 'Cannabis as defined in the Dangerous Drugs Act 1952'. The aggregate net weight of the cannabis being 25,664.8g. The judge's notes of evidence shows that there were repeated references by the chemist to the expression *'Cannabis as defined in the DDA 1952'* with no mention made at any time of the definition section in the Act, of cannabis, to wit, s. 2, which at the material time, provided as follows: "'cannabis' means any part of any plant of the genus Cannabis from which the resin has not been extracted, by whatever name it may be designated".

The court formed the view that the glaring omission by the chemist to refer to **s. 2 of the Act** could give rise to the inference that he did not have in mind the ingredients of cannabis as defined in the section and as explained in *PP v. Alcontara* [1993] 3 MLJ 568 as p. 577.

The court also found defects or infirmities in the chemist's testimony, where he made no mention of the results of his physical examination and whether he carried out any, and if so, what tests. In the result, the court concluded (at p. 234):

> His testimony is open to the construction that the plant material examined by him was either 'cannabis' within the meaning of s. 2 of the Act or that it was 'cannabis (Indian Hemp)' listed in Pt. III of the First Schedule of the Act, though nowhere defined in the Act.

We hasten to add that 'Indian Hemp' was defined in s. 2 of the Dangerous Drugs Ordinance 1952, in the form that it took prior to its deletion by the Dangerous Drugs (Amendment) Act 1972, as follows:

> The dried flowering or fruiting tops of the pistillate plant *Cannabis Sativa L*, from which the resin has not been extracted, under whatever name they may be designated in commerce.

which definition, as explained by Rigby J (as he then was) in *Teoh Soo Tok v. PP* [1961] MLJ 74, still affords useful guidance, as to what constitutes 'cannabis (Indian Hemp)'.

On the other hand, as we have said, 'cannabis' has been defined in s. 2 of the Act and later amended by Act A834, Dangerous Drugs (Amendment) Act 1992, to read:

> any part of any plant of the genus cannabis from which there is found to be present resin irrespective of its quantity, and by whatever name the plant may be designated

as explained in *Alcontara's* case.

The court found in the context of the relevant legislation that "cannabis" and "cannabis (Indian Hemp)" even though of the same weight may not be the same thing, as they may constitute the subject matter of different offences which may be differently penalised. Hence, the court was therefore left in doubt as to whether the accused had committed an offence in a lower or higher degree of seriousness, the latter being trafficking in dangerous drugs. After taking into account the familiar canon of construction that where two views can reasonably be entertained regarding the meaning and effect of provisions in a highly penal statute that in favour of the accused should be adopted and where a finding in a higher degree would mean a mandatory death sentence, the court accordingly quashed the conviction for trafficking and set aside the death sentence, and substituted thereof a conviction under s. 12(2) of the Act and sentenced the accused to five years' imprisonment to take effect from date of arrest.

Our primary consideration in this appeal is the *ratio decidendi* in *Shukri* that the omission by the chemist to mention "cannabis as defined in **s. 2** of the Dangerous Drugs Act 1952" in his testimony or report has created a doubt in the prosecution case as it could give rise to the inference that the plant material could either be "cannabis" within the meaning of **s. 2 of the Act,** or **"cannabis (Indian hemp)"** listed in Part III of the First Schedule of the Act, though nowhere defined in the Act.

In *Mohd. Yusof bin Said v. Public Prosecutor* [1996] 2 CLJ 13; [1996] 1 MLJ 640, the evidence of the chemist PW1 was that the dry plant material which he examined had characteristic features similar to that of cannabis. He also took representative samples of the plant material and carried out a microscopic examination and the two chemical tests which confirmed that it was cannabis. He concluded that by "cannabis" he meant "cannabis as defined under Dangerous Drugs Act 1952" without specifying the words "s. 2".

On appeal, it was the submission of counsel that as the chemist, PW1 had failed to testify that the impugned drug was "cannabis" as defined under **s. 2 of the Act,** this court of three judges should adopt the decision in *Shukri,* and substitute the conviction under s. 12(2) of the Act. The court, however, distinguished *Shukri* where on the facts, it found that the chemist's evidence did not suffer from the defects or infirmities as in *Shukri* and accordingly dismissed the appeal.

The court further held (per Dzaiddin FCJ at p. 647):

> In fact, the issue before us is whether it is fatal to omit the words 's. 2', and our answer is that it depends on the evidence of the chemist in each particular case. If the testimony of the expert witness satisfied the essential ingredients in the statutory definition of 'cannabis', then mere omission to mention the section would not be material, and should not affect his expert opinion. Of course, to avoid similar difficulty in future, it would have been better for the chemist to state: 'cannabis as defined in s. 2 DDA 1952'.

In *Abdullah bin Yaacob v. Public Prosecutor* [1991] 2 MLJ 237, a similar point arose for the decision of the Supreme Court. The evidence of the chemist was that the substance he had examined were ganja but did not say that they were ganja as defined in s. 2 of the Dangerous Drugs Act 1952.

Hashim Yeop A. Sani CJ (Malaya) (delivering the judgment of the court) found as follows (pp. 238-9):

> According to his evidence the chemist (PW1) had examined the 1,001 rolls and had said that all of them were 'vegetable matter' and he had used the words 'vegetable matter' not less than nine times. See pp. 2 and 3 of the record of appeal and this officer (PW1) had used the word 'cannabis' only once and made no reference of the exhibit in relation to s. 2 of the Dangerous Drugs Act 1952. Counsel had stressed that the report of the chemist could not be accepted as corroborative evidence to the evidence of PW1 because the chemist did not say in his evidence that the ganja was ganja as defined under the Dangerous Drugs Act 1952.

> It is certainly true that there is a difference between the drug heroin and the drug ganja or cannabis under the Dangerous Drugs Act 1952. After the amendment to the First Schedule of the Act in 1971, the difference between the two kinds of drugs becomes more obvious and now the drug heroin has become one of the dangerous drugs in the First Schedule but ganja or cannabis still has its own definition. See *PP v. Ong Tee*. Therefore it is not sufficient if there is only the evidence of the chemist that the thing is ganja but there must be evidence confirming that it is ganja as defined under the Dangerous Drugs Act 1952.
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> Looking at the report of the chemist in this case, it is found that he had certified in his report dated 2 November 1983 that the cannabis was as defined in the Dangerous Drugs (Amendment) Act 1980. See p. 63 of the record of appeal. There is no doubt raised whatever that the exhibit examined and analyzed by the chemist (PW1) was ganja according to the requirement of the 1952 Act. This is based on the evidence of the chemist himself. It should certainly be held that the ganja stated by PW1 in his oral evidence must have the same meaning as given in his report before he gave the evidence. Therefore we rejected the argument of the counsel in this issue.

See also the Court of Appeal judgment in *Abdul Karim @ Dolah bin Pak Kub & Anor v. Pendakwa Raya* [1997] 2 CLJ 383; [1997] 1 AMR 264.

Based on the above authorities, we are unanimously of the view that so long as the chemist testifies or certifies to the effect that the plant material which he analysed contained the ingredients of cannabis under the Act, it does not matter whether or not he mentions the words **"s. 2"** of the Act. Therefore, when the chemist says that cannabis as defined in the Act based on the result of his analysis he must have in mind only cannabis as defined in **"s. 2"** since cannabis (Indian Hemp) is nowhere defined in the Act. In short, it depends on the evidence of the chemist in each particular case. We agree with the reasoning in *Mohd Yusof bin Said* that if the testimony of the chemist satisfied the essential ingredients of the statutory definition of "cannabis" under the Act, then mere omission to mention the words **"s. 2"** would not be material and should not affect his expert opinion.

On the third and final ground of appeal, we need only say that we agree entirely with the opinion expressed by the Supreme Court in *Mohamad Radhi bin Yaakob, supra,* at pp. 171-172:

> Whilst we could not disagree with what the learned judge had said earlier in his judgment that if the defence had succeeded in rebutting the presumption of possession under s. 37(d), there was no need to rebut the presumption of trafficking under s. 37(da), it did not follow that the presumption of trafficking would become irrebuttable merely because the

a defence had failed to rebut the presumption of possession. *In our opinion unless the evidence in a particular case does not obviously so warrant, it is incumbent for the court to consider whether on the balance of probabilities, the evidence of the defence has rebutted the statutory presumption of trafficking under s. 37(da) as a separate exercise even though the court is satisfied on balance that the presumption of possession under s. 37(d) has not been rebutted.* (emphasis added.)

b

In the present appeal, we had earlier found that the trial judge had failed to consider, as a separate exercise, whether on the evidence the appellant had succeeded on the balance of probabilities in rebutting the statutory presumption of trafficking under s. 37(da) of the Act. We would reiterate that it was solely on this ground that we quashed the conviction for trafficking and substituted thereof one of possession. Accordingly, we allowed the appeal.

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